Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2009

LUIS FELIX VIERA,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a defendant enters into a plea agreement wherein he agrees to waive his right to a jury trial, does he waive it for charges and/or facts which are not set forth in the plea agreement?

2. Does a judge have the authority to find facts which expose a defendant to more than six months in prison which were not charged in the indictment and were not admitted in the plea agreement, given the fact that serious crimes, defined as those exposing him to more than six months in prison, cause the right of a jury trial to attach—as Justices Kennedy and Breyer stated in *Lewis v United States*, 518 U.S. 322, 331 (1996) (concurring opinion)?

3. Is the denial of a jury trial for crimes or elements of crimes which expose a defendant to more than six months in prison, when documented in a § 2255, a "substantial showing of the denial of a constitutional right, entitling him to a certificate of appealability" ("COA")?

4. Should a COA have issued in the instant case pursuant to *Miller-El v Cockrell*, 537 U.S. 322, 327-337 (2003)?

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CITATIONS OF OPINIONS BELOW

The decision of the Eleventh Circuit denying a COA was rendered on December 4, 2009, and is attached as Appendix Page A-1 through A-6. The decision of the District Court denying Petitioner's Application of a COA was rendered on April 23, 2009, and appears in Appendix Pages B-1 through B-2. The decision of the Middle District of Florida Court denying Petitioner's § 2255 was rendered on June 2, 2009, and appears on Appendix Pages C-1 through C-3.

JURISDICTION

The denial of Petitioner's Application to the Eleventh Circuit for a COA was filed on December 4, 2009.

Petitioner filed his § 2255 Motion well within one year of the finality of his conviction, mailed on December 29, 2008, following sentence on July 31, 2008, in the Middle District of Florida, in Case No. 5:07-cr-44-oc-10grt.

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2253(c) (1) (B).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, or induces or procures its commission, is punishable as a principle.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principle."

18 U.S.C. § 201 (b) (1):

" Whoever – (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent ---...(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official or such person who has

been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person. "

18. U.S.C. § 201 (b)(2):

"Whoever ---... (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person; ... shall be fined under this title not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

18 U.S.C. § 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of

such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both."

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18. U.S.C. § 1791 (a) (1) – (a) (2):

"Whoever – (1) in violation of a statute or a rule or order issued under a statute, provides an inmate of a prison a prohibited object, or attempts to do so; or (2) being an inmate of a prison, makes, possesses, or obtains, or attempts to obtain, a prohibited object; shall be punishable as provided subsection (b) of this section... (b) (4) imprisonment for not more than one year, or [fined or] both, if the object is specified in the Subsection (d) (1) (D) or (d) (1) (E) of this section... (d) (1) (D) a controlled substance (other than a controlled substance referred to in subparagraph (A), (B), or (C) of this subsection) or an alcoholic beverage."

28 U.S.C. § 2253:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final

order shall be subject to review on appeal, by the court of appeals for the circuit in which the proceeding is held...

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from...

(B) The final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the appellant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255(a):

A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct that sentence.

Article III, Section 2, Clause 3:

The Trial of All Crimes, except in cases of Impeachment, shall be by Jury...

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner served as a correctional officer in the Federal Bureau of Prisons ("BOP"), most recently in Florida. He was accused of several Counts of violation 18 U.S.C. §§ 2, 201, 371, and 1791. He entered a plea of guilt to Counts One, Five, Six and Seven, alleging violations of the above statutes. The circumstances surrounded providing cigarettes to an inmate in consideration of money.

In the plea of guilt, Petitioner admitted that he was a "public official." However, the plea agreement said nothing about guilt being a "public official in a high-level decision-making or sensitive position." At sentencing the judge accepted the word of a non-attorney probation officer, supported by the AUSA, that the Petitioner was in a "sensitive" position and, hence, the court ought to add 4 levels to the BOL. The added four levels for allegedly being an officer in a "high-level decision-making, or sensitive position" exposed Petitioner to, not just 183 or more days in prison, but 18 months' imprisonment on top of the range of sentence justified by the admitted facts and guilt in the plea agreement. Petitioner was informed that by entering his plea he would receive no more than 18 months; instead he received 41 months. He did not waive his right to a jury trial to

any fact or charge not set forth in the plea agreement.

Petitioner waived his right to appeal or challenge collaterally any sentence within the statutory maximum. However, he did not waive his jury trial rights as to facts not admitted which would expose him to more than six months in prison.

Petitioner filed a timely § 2255 motion with the district court and challenged the jurisdiction of the court to find him guilty of facts which he did not admit and which were not even suggested in the plea agreement. He admitted guilt as to the facts set forth in the plea, but not as to facts which were not admitted.

His challenge was based upon the jurisdiction of the courts as set forth in Article III, Section 2, Clause 3, which reserves to a jury the determination of guilt in criminal trials—unless such right is waived; but as to the facts and crimes admitted to which the right of jury determination is waived.

This case is similar to that the Court decided in *Blakely v Washington*, 542 U.S. 296 (2004). Based upon the "facts admitted in his plea, standing alone,... a maximum sentence of [27 to 33 months, according to the BOL for the admitted conduct and

facts]." (*Blakely*, 542 U.S. at 298; U.S.S.G. § 2C1.1(a)(1), (b)(1) and (2), Sentencing Table 18 U.S.C.S. Appx, Ch. 5, Pt. A, BOL 18, Criminal History Category I.)

Contrary to this Court's opinions in *Blakely* and *Cunningham v California*, 166 L.Ed. 2d 856, 864-865, the lower court found facts which elevated the sentence to that justified under a BOL of 22, that of 41 to 51 months.

The district court denied the § 2255 on the ground that the sentence was not in excess of the statutory maximum. It then denied a COA and Petitioner appealed and asked the 11th Circuit for a COA. The ground stated was that there was no substantial showing of the denial of a constitutional right and that no jurist of reason would find the decision debatable. This Petition follows.

This petition raises highly important questions pertaining to the reach of Remedial-*Booker*, which has been the subject of considerable debate, both in this Court and in the lower courts, and this Court's clarification would be a great aid to the lower courts in adjudicating the issues involved.

However, the primary questions are whether a COA should have been issued and whether the Eleventh Circuit ought to have attempted to decide

the issues without jurisdiction. Pursuant to Supreme Court Rule 14(h), Petitioner avers that the lower courts "entered a decision in conflict with the decision," not just of other circuits, rather, this Honorable Court; they decided "an important federal question" which calls for "an exercise of [its] supervisory power." The issues are not alleging "erroneous factual findings or the misapplication of properly stated rule[s]." This petition follows.

REASONS FOR GRANTING THE WRIT

1(a). The Eleventh Circuit erred when it concluded that Petitioner had failed to make a substantial showing of the denial of a constitutional right; the right alleged to have been violated was the right to a jury trial for facts which exposed him to far more than six months in prison.

Admittedly, the first consideration in granting a certificate of appealability ("COA") is whether or not "the applicant has made a substantial showing of the denial of a constitutional right." (28 U.S.C. § 2253(c)(2))

This is how Petitioner met this standard. His first ground for relief in his § 2255 was that the court exceeded its jurisdiction when it tried him without a jury for facts which not only exposed him to more than six months in prison, but resulted in a sentence nearly twice what the Guidelines BOL range was, as set forth below. Petitioner made a strong argument in his Motion and in his Application for a COA that

he had been tried, found guilty and received as much as double the sentence prescribed for the conduct alleged in the indictment and admitted in the plea.

The Guidelines BOL range for the admitted facts and conduct was 27-33 months. The added four-level enhancement resulted in a BOL range of 41-51 months. Just as in *Blakely* and *Cunningham*, the guideline sentencing scheme allowed was used by Petitioner's judge to find facts in addition to those admitted or found by a jury, and this increased the Guidelines BOL by as much as almost double—as little as 27 to as much as 51 months.

The question is not whether the court had to follow the Guidelines, the Remedial-*Booker* Court determined that the Guidelines were "advisory." The question is whether the court had the jurisdiction/authority to find facts which elevated the BOL by more than six months, the point at which the right to a jury trial attaches.

In *Lewis v United States*, 518 U.S. 322, 331, Justices Kennedy and Breyer, in their concurring opinion, stated that the right to a jury trial "attaches" whenever a defendant is charged with a serious crime, defined as one exposing him to over six months in prison, regardless of the sentence actually imposed. Already it is evident that Petitioner's constitutional right to a jury trial was violated.

Justice Scalia, joined by Justices Souter and Ginsburg (concurring and dissenting) in *Neder v United States*, 527 U.S. 1, 30, said:

> "Article III, § 2, cl. 3, of the Constitution provides: 'The Trial of all Crimes, except in Cases of Impeachment, shall be by jury....' The Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....' When this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy."

From the above, it is clear that the lower courts denied Petitioner one of the most precious protections in the Constitution. Petitioner set forth far more than ample facts from the record and caselaw to support this ground. How was it then that the lower courts refused to even consider it and the Eleventh Circuit said that he had failed to make a substantial showing of the denial of a constitutional right?

In *Miller-El*, 537 U.S. at 327, this Court said that "[a] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues deserve encouragement to proceed further. *Slack, supra* at 484."

Petitioner quoted a plethora of cases in which "jurists of reason" not only found the district court's resolution debatable, they outright disagreed with it. Additionally, many quotations showed that at the very least, the issue deserved encouragement to proceed further. Having satisfied the standard this Court set for this, consistent with the statute (28 U.S.C. § 2253), the lower courts ought to have certified this issue for appellate review. That would have enabled this Court to make a firm determination of a critical question which has divided this Court and virtually all the lower courts.

1(b). The use of the term "statutory maximum" in guideline sentencing cases must be presumed to be the BOL range for the jury-found or admitted crimes and facts.

In *Blakely*, the issue wasn't whether the statute allowed a higher sentence than the 53 months prescribed for the admitted crime. The question was whether the "facts admitted in [the] plea, standing alone, supported [more than] a maximum sentence of 53 months." (*Id.*, 542 U.S. at 298) The Court said:

> "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

> *reflected in the jury verdict or admitted by the defendant*.... In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may find *without* any additional findings....
>
> "'[A]n exceptional sentence can be considered only if it takes into account factors other than those which are used in *computing the standard range for that offense*,' *Gore*, 143 Wash 2d, at 315-316, 21 P3d, at 277.... The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi*." (542 U.S. at 303-304) (emphasis added in second paragraph, emphasis in first paragraph in the original.)

In *Cunningham*, another State guideline sentencing scheme, Justice Ginsburg quoted most of the above words of Justice Scalia at 166 L.Ed. 2d 864-865. That decision obviously was not limited to California's DSL, for repeatedly she and the dissenting Justices referred to the Federal Guidelines. She was the fifth Justice required for the Remedial-*Booker*. When Justice Alito suggested that his understanding of the advisory nature after Remedial-*Booker*, that "it seems clear that this regime permits—and, indeed, requires—sentencing

judges to make factual findings and to base their sentences on those findings," (*id.*, 166 L.Ed. 2d at 881), Justice Ginsburg said that *Booker*'s remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless." (*Id.*, at 876) She added in footnote 15 that "[t]here would have been no majority in *Booker* for the revision of *Blakely* essayed in [Justice Alito's] dissent."

Hence, under the Federal Guidelines, the "advisory" nature still requires that the correct BOL be 'taken account of," (166 L.Ed. 2d at 872) and then the courts are allowed to consider that *correct* BOL range, based, not on facts found after the trial or plea, rather "*without* any additional findings," (*id.*, at 865; *Blakely*, 542 U.S. at 304), "along with the sentencing goals [the Federal] Congress enumerated in the SRA at 18 U.S.C. § 3553(a)."

1(c). The "advisory" nature of the post-Remedial-*Booker* decision means that once the *correct* Guideline BOL is determined, the court may take into consideration the demeanor of the defendant, and other mitigating and aggravating factors in 18 U.S.C. § 3553(a), *but not* other facts or crimes which authorize a higher BOL range.

It can't be any other way. Justice Breyer, writing for the Remedial-*Booker* Court, was adamant that the Guidelines remain. "[T]he Sentencing Commission remains in place ... the remaining system, while not the system Congress enacted, nonetheless continue." (*Booker*, 543 U.S. 220, 264)

Hence, it is Petitioner's assertion, consistent with the varied opinions of this Court and the Constitutional guarantees under Article III, Section 2, Clause 3, and the Sixth Amendment, that as long as the United States Sentencing Guidelines are still in effect, the courts are still obliged to set the BOL based upon the *correct*, jury-found or admitted conduct, and *not upon "any additional findings."* (*Cunningham*, 166 L.Ed. 2d at 865)

Absent such a determination, the right of a jury trial becomes completely meaningless. Justices Kennedy's and Breyer's concurring opinion in *Lewis*, that the right to a jury trial attaches when a defendant is exposed to more than six months in prison, (*id.*, 518 U.S. at 331), means nothing if the Court decides otherwise. The whole line of post-*Apprendi* cases leads to this conclusion, though, as Justice Alito admits, "the *Booker* Court did not spell out in detail how sentencing judges are to proceed under the new Guidelines regime," (*Cunningham*, 166 L.Ed 2d at 881), and Justice Souter said in his

dissenting opinion in *Rita v United States*, 168 L.Ed. 2d 203, 235 (2007): "Applying the Sixth Amendment to current sentencing law has gotten complicated, and someone coming cold to this case might wonder how we reached this point."

If sentencing courts can, indeed, find facts after the jury has reached their verdict or a defendant has admitted the offense and facts in the plea, then, for a fact, the conclusion of Justice Scalia in *Blakely* has been "rendered toothless," or "revised." (*Cunningham*, 166 L.Ed. 2d at 876 and n. 15.)

From a practical standpoint, the burden on the courts at all levels would be well served by a clear definition as to what "statutory maximum" in the Federal Guidelines means and what "advisory" means in relation to Article III, Section 2, Clause 3, and the Sixth Amendment.

2. Jurists of reason definitely would find that the way the district court resolved the constitutional issue presented in Petitioner's § 2255 either debatable or deserving of encouragement to proceed further and a COA ought to have been issued.

The Court need look no further than its own Justices to see that this issue is debatable and

deserves encouragement to proceed further. At one end of the spectrum Justice Alito, in his dissenting opinion in *Cunningham v California*, 166 L. Ed. 2d. 856, 881, said that "the *Booker* Court did not spell out in detail how sentencing judges are to proceed under the new advisory Guidelines regime." He added that in his opinion "it seems clear that this regime permits—and, indeed, requires—sentencing judges to make factual findings and to base their sentences on those findings."

At the other end of the spectrum, Justice Ginsburg, writing for the majority, said that "the Federal Constitution's jury-trial guarantee proscribes a ... judge to impose a sentence above the statutory maximum based on a fact ... not found by a jury." (*Id.*, at 864)

Probably the closest opinion which fits the assertions Petitoner has made in his § 2255 and in this Petition, is suggested by Justices Kennedy and Breyer, in their dissenting opinion, opined (*Id.*, at 878):

> "The system of guided discretion would be permitted to a large extent if the Court confined the *Apprendi* rule to sentencing enhancements based on the nature of the offense. These would include, for example, the fact that a weapon was used; violence was

> employed; a stated amount of drugs or other contraband was involved; or the crime was motivated by the victim's race, gender, or other status protected by the statute....
>
> "On the other hand, judicial determination is appropriate with regard to factors exhibited by the defendant. These would include, for example, prior convictions; cooperation or non-cooperation with law enforcement; remorse or the lack of it; or other aspects of the defendant's history bearing upon his background and contribution to the community. This is so even if found by the judge by a preponderance of the evidence. These are facts that should be taken into account at sentencing but have little if any significance for whether the defendant committed the crime."

If it is true that "a petitioner must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues were "adequate to deserve encouragement to proceed further,"" (*Miller-El v Cockrell*, 537 U.S. 322, 336 (2003)), and that "[a] petitioner satisfies this standard [of a substantial showing of the denial of a constitutional right] by demonstrating that jurists could disagree...or that jurists could conclude the issues presented are

adequate to deserve encouragement to proceed further," (*id.*, at 327), then the various opinions of this Court's jurists of reason stated above would fit the standard and a COA should have issued.

In *Cunningham*, 166 L. Ed. 2d at 864, Justice Ginsburg spoke of "the judge's province." At 869, she spoke of the "domain of the jury," which obviously means the jury's province. In *Blakely*, 542 U.S. at 306, Justice Scalia said that "the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." He spoke of "the Framer's paradigm for criminal justice...[as] the common law ideal of limited state power accomplished by strict division of authority between judges and jury." (*Id.*, at 313)

In *Oregon v Ice*, 172 L. Ed. 2d 517, 522, Justice Ginsburg said that "it is within the jury's province to determine any fact ... that increases the maximum punishment authorized for a particular offense." At 524 she spoke of "the jury's historic role as a bulwark between the State and the accused at trial for an alleged offense." At 526, she spoke of her holding, "in *Cunningham* that the facts permitting imposition of an elevated 'upper term' sentence for a particular crime fell within the jury's province."

These facts are all relevant to Petitioner's ground for relief in his § 2255. He stated that he was exposed to almost double the BOL maximum

for the crimes he was accused of violating by the judge invading the province of the jury, usurping that power the Framers gave to the jury, and finding him guilty of uncharged aggravating alleged facts which exposed him to 51 months for the alleged crimes with a BOL maximum of 33 months; then sentencing him to seven months over the BOL maximum, something the Framers never intended.

It is true that Article III, Section 2, Clause 1, gives "power" to the courts in cases or controversies involving, among other things, violations of federal criminal laws. However, that "power" is reserved to the jury in Clause 3. (*See, e.g., Blakely*, 542 U.S. at 305-306) ("the right of jury trial...is no mere procedural formality, but a fundamental *reservation of power* in our constitutional structure.") It could well be said that the jurisdiction of the courts in criminal trials for serious crimes has two components: (1) The Clause 1 case in controversy, and Clause 3, jury trial or plea of guilt.

From the foregoing it is apparent that Petitioner has made a substantial showing of the denial of a constitutional right; therefore, the Eleventh Circuit erred in their conclusion to the contrary. It is also apparent that there are a host of "jurists of reason" who would or have found the lower court's resolution of Petitioner's claims either "debatable" or "deserving of encouragement to proceed further."

Thus, a certificate of appealability ought to have been issued certifying the issue of whether the district court exceeded his jurisdiction by going beyond the "power" granted to him in Article III, Section 2, Clause 1, which was limited in Clause 3 with respect to criminal trials.

The fact that there are jurists of reason who would find the way the district court decided Petitioner's first ground in his § 2255 debatable is well stated by Justice Souter in his dissenting opinion in *Rita*, 168 L. Ed. 2d at 235: "Applying the Sixth Amendment to current sentencing law has gotten complicated, and someone coming cold to this case might wonder how we reached this point."

Examined, not just from the perspective of the Sixth Amendment, but also from Article III, Section 2, Clauses 1 and 3—which was not attempted in any of the *Apprendi* line of cases—also deserves encouragement to proceed further. At the least, the question of whether a court has the jurisdiction to try a defendant and find guilt and impose more than six months in prison, is a question of first impression in the Tenth Circuit. (*See, e.g., Houston v Lack*, 487 U.S. 266, 269) (citing without disfavor that a court could "issue a certificate of probable cause [now a certificate of appealability]...noting that the appeal presented a 'question of first impression' in the jurisdiction.")

It is unquestionable that this issue raises a concern which has been voiced by many jurists of

reason and which the Court would do well to clarify for the lower courts. The Court would eliminate many of the appeals and post-conviction efforts which plug the dockets of the courts at all levels if it spoke clearly on this issue. Surely, this is an issue which deserves encouragement to proceed further.

Therefore, Petitioner asks the Court to certify these issues for appellate review in a COA:

A. Whether a judge exceeds his constitutional jurisdiction when he finds a defendant guilty of facts which expose him to more than six months in prison, and does so on a civil case standard of preponderance of the evidence?

B. Whether Movant entered a constitutionally sufficient waiver of his right to a jury trial on facts which were not set forth in the plea agreement and for which he received more than six months additional sentence.

By executing this petition this 22nd day of February 2010, Petitioner certifies that the statements herein are true under penalty of perjury.

/S/ Luis Felix Viera
Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-12927-g

LUIS FELIX VIERA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Luis Felix Viera, a federal prisoner serving a 41-month sentence for conspiracy to commit an offense again the United States and bribery of a public official, seeks a certificate of appealability to appeal from the district court's denial of his motion to vacate, filed pursuant to 28 U.S.C. § 2255. In order to obtain a COA, a prisoner must show that reasonable jurists would find it debatable whether: (1) the district court was correct in its procedural

ruling; and (2) the motion states a valid claim of the denial of a constitutional right. *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed.2d 542 (2000); *see also* 28 U.S.C. § 2253 (c)(2).

In his motion to vacate, Viera raised the following claims: (1) the sentencing court lacked jurisdiction to enhance his sentence, as the court made findings of fact that were not admitted by him, in violation of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005); and (2) counsel was ineffective for failing to raise the sentencing issue on appeal. First, because he did not challenge his sentence on direct appeal, his claim as to sentencing error is procedurally defaulted. *See Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004) (holding that, under the procedural default rule, a criminal defendant who fails to raise an issue on direct appeal is procedurally barred from raising the claim in a § 2255 motion, absent a showing of cause and prejudice or a fundamental miscarriage of justice).

Furthermore, Viera waived his right to challenge his sentence because he voluntarily and knowingly entered into a sentence-appeal waiver when he pled guilty. A valid sentence-appeal waiver precludes § 2255 claims based on ineffective assistance of counsel at sentencing. *Williams v.*

United States, 396 F.3d 1340, 1342 (11th Cir. 2005), an appeal waiver includes "the waiver of the right to appeal difficult or debatable legal issues or even blatant error," and broad waiver language also precludes challenges on *Apprendi/Blakely/Booker* grounds. *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir. 2005). An appeal waiver in a plea agreement will be enforced if the government demonstrates that: (1) the district court specifically questioned the defendant about the waiver during the plea colloquy; or (2) the record clearly shows that the defendant otherwise understood the full significance of the waiver. *Id.* At 1341.

The record reflects that Viera signed the plea agreement that contained an explicit waiver of his right to appeal or collaterally challenge his sentence. Specifically, the plea agreement stated, in relevant part:

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant's sentence or to challenge it collaterally on any ground, including the ground that the Court erred in determining the applicable guideline range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant's applicable

guidelines range, as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (3) the ground that the sentence violates the Eight Amendment.

During the plea hearing, the judge specifically addressed the implications of the sentence-appeal waiver, and Viera acknowledged that he understood that he was waiving his right to appeal his sentence, or to challenge it collaterally on any ground, provided that it was inside the applicable guideline range, did not exceed the statutory penalty, and did not violate the Eight Amendment. At sentencing, the court determined that the applicable guideline range was 41 to 51 months' imprisonment, and the court imposed a guideline sentence of 41 months' imprisonment.

Viera has made no allegation that his waiver was involuntary, that the plea agreement was improper, the counsel was ineffective in plea negotiations, or that counsel unduly influenced him to plead guilty. Furthermore, the record reflects that Viera's plea was knowing and voluntary. At the change of plea hearing, Viera indicated that no one forced or threatened him to get him to plead guilty, that he was entering into the written plea agreement knowingly and voluntarily after discussing it with

his lawyer, that no other promises or assurances were made to get him to enter into the plea, and that he understood the penalties faced- specifically, the mandatory minimum sentence of 15 years imprisonment. Therefore, because Viera voluntarily waived his right to challenge his sentence in a collateral attack, except on limited grounds that are not applicable in this case, the sentence-appeal waiver is enforceable.

In a case in which the waiver language was almost identical to the language here, this Court held that the general appeal-waiver language of the plea agreement precluded an *Apprendi/Blakely/Booker* claim. *See Grinard-Henry*, 399 F.3d at 1296-97 (holding that, where a defendant's sentence did not exceed the statutory maximum, the defendant's claim challenging the sentencing court's factual findings, based on facts not found by a jury, directly involves the application of the sentencing guidelines). This Court also noted that the waiver's language as to the court's "jurisdiction and authority to impose any sentence up to the statutory maximum" indicated that the defendant "conceded the applicability of the sentencing guidelines to his case." *Id.* at 1297. Therefore, as Viera's challenges to his sentence did not fall under the exceptions stated in his sentence-

appeal waiver, the district court properly determined that his claims were barred.

Viera's motion for a certificate of appealability is DENIED because he has failed to make the requisite showing. *See* 28 U.S.C. § 2253 (c)(2); *Slack*, 529 U.S. at 478, 120 S. Ct. at 1600-01.

/S/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

OCALA DIVISION

Luis Felix Viera,

Petitioner

-vs-

Case No. 5:09-cv-2-Oc-10GRJ

UNITED STATES OF AMERICA

Respondent.

ORDER

The Defendant/Petitioner previously filed a motion pursuant to 28 U.S.C. § 2255 attacking his sentence, which the Court denied by its Order dated April 22, 2009 (Doc. 10). The case now comes before the Court for consideration of the Defendant/Petitioner's Notice of Appeal and Application for Certificate of Appealability (Doc 13).

Pursuant of Federal Rule of Appellate Procedure 22(b)(1), the Court must either issue a certificate of appealability or state why a certificate should not issue. Upon due consideration, and for the reasons states in the Court's Order of April 22, 2009

denying the Defendant/Petitioner's motion pursuant to 28 U.S.C § 2255, the Court finds that the Defendant/Petitioner has not made a substantial showing of the denial of a constitutional right. As such, the Defendant/Petitioner's Application for a Certificate of Appealability (Doc. 13) is DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 2nd day of June 2009.

/S/ William Terrell Hodges
UNITED STATES DISRTICT JUDGE

Copies to: Counsel of Record
Luis Felix Viera, *pro se*

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

LUIS FELIX VIERA,

Petitioner,

-vs- Case Nos. 5:09-cv-2-Oc-10GRJ
5:07-cr-44-Oc-10GRJ

UNITED STATES OF AMERICA,

Respondent.

ORDER

The Defendant/Petitioner has filed a motion for relief under 28 USC § 2255 (Doc 1). By order of the Court of the United States has responded to the motion; and, for the reasons stated in the Government's response, the Court has determined that the motion is without merit and it will be denied.

Specifically, the record reflects that the Defendant's plea agreement with the United States

contains an explicit waiver of his right to collaterally challenge his sentence on any basis, including the ground that the Court erred in determining the applicable Sentencing Guidelines range.

Secondly, the Defendant did not file an appeal and the claim made in his motion – a Guidelines sentencing issue – could and should have been raised by way of direct appeal. In the absence of showing of cause and prejudice, the claim is now procedurally barred.

Third, the claim made in the motion lacks any merit under the Guidelines. The Defendant complains that he received a four level enhancement under § 2C1.1(b)(3) because he was at the time of his offense a "public official" in a "sensitive position." And, Application Note 4(B) under §2C1.1 expressly provides that examples of a public official who holds a sensitive includes a law enforcement officer. At the time of his offense the Defendant was a federal corrections officer with authority to bear a firearm and make arrests thereby meeting any definition of "law enforcement officer" under the law.

Fourth, the Defendant claims that the Court violated *Booker* by making findings of fact concerning his status as a law enforcement officer in a sensitive position. This claim fails, however,

because the Sentencing Guidelines are advisory, not mandatory, and the Court's sentence ultimately imposed after due consideration of the sentencing factors enumerated in 18 USC § 3553.

The motion (Doc. 1) is DENIED with prejudice and the Clerk is directed to enter judgment to that effect.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 22nd day of April, 2009.

/S/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE

Copies to: Luis Felix Viera, *pro se*
United States Attorney
Maurya MeSheehy